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TO: Jerilyn Oshel, Division Director
FROM: Heather Adams, Assistant Attorney General *HA*
DATE: October 31, 2014
RE: E-cigarettes and Local Regulation

You have asked whether local governments can adopt more stringent standards regarding electronic cigarettes ("e-cigarettes") than those established in recently enacted House File 2109. You have specifically asked whether a city or county can adopt an ordinance prohibiting the use of e-cigarettes in public places, and whether local governments can regulate other facets of e-cigarettes such as permitting or taxation.

It is my opinion that the adoption of a local ordinance prohibiting the use of e-cigarettes in public places would not be preempted by state law, and that cities and counties can therefore adopt regulations prohibiting the use of e-cigarettes in public places. However, local governments are likely preempted by state law from adopting local regulations which govern age restrictions, permitting, taxing, and product placement of e-cigarettes.

Background

House File 2109, effective July 1, 2014, defines and regulates two products that were not previously covered under Iowa law: alternative tobacco products¹ and vapor products.²

The bill:

- (1) establishes an age requirement for the use and possession of these products;
- (2) requires distributors, wholesalers, vendors, and retailers to obtain a permit to sell or distribute these products;
- (3) limits the product placement of these devices; and
- (4) restricts the places where the products can be given away.

¹ "Alternative tobacco product" means a product, not consisting of or containing tobacco, that provides for the ingestion into the body of nicotine, whether by chewing, absorbing, dissolving, inhaling, snorting, or by any other means. "Alternative nicotine product" does not include cigarettes, tobacco products, or vapor products, or a product that is regulated as a drug or device by the United States food and drug administration under chapter V of the federal Food, Drug, and Cosmetic Act. HF 2109, § 2.

² "Vapor product" means any noncombustible product, which may or may not contain nicotine, that employs a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size, that can be used to produce vapor from a solution or other substance. "Vapor product" includes an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device, and any cartridge or other container of a solution or other substance, which may or may not contain nicotine, that is intended to be used with or in an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device. "Vapor product" does not include a product regulated as a drug or device by the United States food and drug administration under chapter V of the federal Food, Drug, and Cosmetic Act. HF 2109, § 2 (emphasis supplied).

Notably, the use of the two products is not governed by the Smokefree Air Act (“SFAA”) -- which prohibits smoking in almost all public places – as the SFAA governs only those products which contain tobacco. Iowa Code § 142D.2(21) (“‘*smoking*’ means inhaling, exhaling, burning, or carrying any lighted cigar, cigarette, pipe, or other tobacco product in any manner or in any form”).

Local Regulation & Preemption

The question of whether a county or city may adopt a regulation which is more stringent than HF 2109 requires an analysis of the local government’s legal authority to act and application of the legal doctrine of preemption. A county or city may not establish standards or requirements which are “lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise.” Iowa Code §§ 331.301(6), 364.3(3). A city or county may not pass a local regulation which is irreconcilable with state law. Iowa Code §§ 331.301(4), 364.2(3); *see also* Iowa Const., art.III, § 38A.

The Iowa Supreme Court will attempt to harmonize state and local laws, particularly where a law addresses the health and safety of citizens. *See Kent v. Polk County Bd. of Supervisors*, 391 N.W.2d 220, 223 (Iowa 1986). However, the Court has recognized the authority of the general assembly to preempt local regulation, and has found that such preemption may be either express or implied. *Goodell v. Humboldt County*, 575 N.W.2d 486, 492 – 93 (Iowa 1998).

Express preemption.

“Express preemption occurs where the legislature has explicitly prohibited local action in a given area.” *Madden v. City of Iowa City*, 848 N.W.2d 40, 49 (Iowa 2014). Iowa law does not expressly prohibit local governments from enacting regulation prohibiting the use of e-cigarettes in public places, although it likely does expressly preempt local regulation in the four areas covered by the bill: age restrictions, permitting, taxing,³ and product placement of e-cigarettes.

HF 2109 modifies Iowa Code chapter 453A, now titled the “Cigarette and Tobacco Taxes and Regulation of Alternative Nicotine Products and Vapor Products.” Iowa Code chapter 453A contains a provision on uniform application of the chapter, stating:

Uniform application. Enforcement of this chapter shall be implemented in an equitable manner throughout the state. For the purpose of equitable and uniform implementation, application, and enforcement of state and

³ Additionally, with respect to taxation, home rule provisions in the Iowa Constitution restrict cities and counties from levying a tax unless expressly authorized by the legislature to do so. Constitution of the State of Iowa, Art. III, §§ 38A and 39A.

local laws and regulations, the provisions of this chapter shall supersede any local law or regulation which is inconsistent with or conflicts with the provisions of this chapter. Iowa Code § 453A.56.

The Iowa Supreme Court has held that this language explicitly prohibits a local jurisdiction from adopting more stringent standards than those which were established in the state law. *James Enterprises v. City of Ames*, 661 N.W.2d 150, 153-54 (Iowa 2003). Thus, a local jurisdiction would likely be preempted from adopting regulations governing e-cigarettes in those areas regulated by chapter 453A: age restrictions, permitting, taxation, and product placement.

However, HF 2109 does not include any language which restricts where e-cigarettes may be used, nor does the bill expressly prohibit a local governmental entity from adopting a local ordinance as it relates to the *use* of e-cigarettes. Because Iowa Code chapters 453A and 142D and HF 2109 do not explicitly limit the ability of political subdivisions to impose restrictions on the use of e-cigarettes, state law does not expressly preempt local legislation on this subject. *See Davenport v. Seymour*, 755 N.W.2d 533, 538 (Iowa 2008).

Implied preemption.

Implied preemption may be established one of two ways: field preemption, which occurs when the legislature has enacted a comprehensive regulatory framework; or conflict preemption, which occurs when a local ordinance conflicts with a state statute. *Madden*, 848 N.W.2d at 49. Field preemption will be found when the legislature has covered a subject matter so comprehensively that it demonstrates a legislative intention that the field is preempted by state law, and conflict preemption exists when a local ordinance prohibits an activity permitted by statute or permits an activity prohibited by statute. *Goodell v. Humboldt County*, 575 N.W.2d 486, 493 (Iowa 1998).

With respect to field preemption, the “mere fact that the general assembly has legislated extensively in a given area does not itself establish legislative intent to occupy the field,” and the Supreme Court has rarely found a statute to occupy the field so as to provide localities with the flexibility needed to address local issues. 2000 WL 33258478 at * 3; *see also Davenport v. Seymour*, 755 N.W.2d 533 (Iowa 2008) (local ordinance establishing traffic enforcement system was not impliedly preempted by state statutes governing speeding and traffic signals); *BeeRite Tire Disposal/Recycling, Inc. v. City of Rhodes*, 646 N.W.2d 857, 860 – 61 (Iowa 2002); 2008 WL 6690123 (Iowa A.G.) (state law does not preempt cities from imposing stricter residency requirements for sex offenders than those imposed in chapter 692A).

There is not an express indication in HF 2109 or chapter 453A that the legislature intended to occupy the field with respect to all facets of e-cigarette sales, distribution, marketing, and use. As noted above, chapter 453A does contain an

express indication that the legislature intended to prohibit local regulation which would be inconsistent with or in conflict with the provisions addressed by the chapter – namely age restriction, permitting, taxation, and product placement. However, chapter 453A contains no restrictions whatsoever with respect to where vapor products may be used. Topic areas which are entirely unaddressed by the chapter, such as place of use restrictions, are likely not preempted under field preemption.

With respect to conflict preemption, “the issue must be whether the local ordinance prohibits an act expressly *sanctioned* by state law.” 2000 WL 33258478 at * 3 (emphasis in original). Neither the SFAA nor HF 2109 embodies an express sanction of the use of e-cigarettes in designated places. *Id*; see also *Patty Sue, Inc. v. City of Springfield*, 2012 WL 2317766 (Mo. App. S.D.). Hence, a local ordinance which prohibits the use of e-cigarettes in public places could exist harmoniously with Iowa Code chapters 142D and 453A, and conflict preemption would likely not occur. *Davenport v. Seymour*, 755 N.W.2d 533, 538 – 39 (Iowa 2008). However, a local ordinance which contained age restrictions or permitting requirements that differed from those contained in chapter 453A would likely be found to be in conflict with state law. *Id*.

Summary

Iowa law does not currently address, restrict, or govern where electronic cigarettes may be used. A local governmental entity is therefore likely not preempted from enacting regulations restricting the places electronic cigarettes may be used. Local governments should consult with their legal counsel prior to adopting regulations restricting where e-cigarettes may be used to ensure that preemption issues are fully identified and addressed.

Iowa Code chapter 453A, as recently amended, does contain age restrictions governing the use of electronic cigarettes, and further governs permitting, taxation, and product placement related to these devices. This law also contains a legislative directive that these provisions be applied uniformly throughout the state and that such provisions supersede any local regulation which is inconsistent with or conflicts with such provisions. Local governments should therefore proceed with caution in regulating these aspects of electronic cigarettes and should consult with their legal counsel to determine whether such regulations would in fact be preempted by state law.

Please note that this memorandum is not a formal opinion of the Attorney General.